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MUNICIPAL CORPORATION ATTACHING CONDITIONS TO USE OF STREETS BY PUBLIC SERVICE COMPANIES.

It is suggested by the case of Springfield v. Springfield Gas Company, 31 Ohio C. C. Rep. 446, which decision was rendered in 1907 and appears in these reports as published in 1911, that natural gas companies are, sometimes at least, admitted to cities with the intent that they should supplement rather than supplant old companies supplying artificial gas. Urban inhabitants and authorities may have looked kindly upon their entrance upon this theory, because municipalities owned their own gas works. Or restrictions may have been attempted to be imposed at the instigation of stockholders of companies manufacturing gas. Perhaps, also, it may have been thought that natural gas was objectionable in some way, of which police power could take notice, when proposed as an illuminant.

Whatever the reason, we see from the case we have instanced that a gas company having the right to manufacture and supply to the city of Springfield artificial, gas, was therein established and doing business. Afterwards the city council granted to a natural gas company the right to lay and maintain in its streets pipes for supplying the city and its inhabitants with natural gas for heating, fuel and power purposes only. When this franchise was granted, the granting ordinance fixed the price to the consumer at ten cents per thousand cubic feet, while that of artificial gas was $1.50.

Some seven years afterwards the artificial gas company acquired by purchase all of the property of the natural gas company. Before this, however, the latter company made no objection to purchasers of its gas using it also for illuminating purposes, all of which was known to the artificial gas company, whose charter some ten years later was amended so as to authorize it to sell and deliver gas both artificial and natural.

At this stage the artificial gas company deemed itself sufficiently entrenched to enforce a demand that natural gas should not be used for illuminating purposes and threatened that, unless appliances for using natural gas for light were disconnected, it would refuse to furnish such gas for any purpose. The city brought injunction.

It was pointed out that Ohio statute authorizes natural gas companies to supply natural gas for lighting purposes and gives them the power of eminent domain. It is also said they may occupy streets and alleys, but only upon terms and conditions to be fixed by cities and villages. One of such conditions recognized by Ohio law to be imposable was the rate the city or village elected to be charged. This city claimed that there was no estoppel in its attempt to confine the use to heat, fuel and power, and, therefore, it could require defendant as a public service corporation to perform its full charter powers.

After premising that neither of the original companies could have been granted exclusive rights to the use of the streets and alleys for its purposes, it is said that a user of gas is the user of a commodity that belongs to him and: "A municipality has not the authority to prescribe by ordinance that its inhabitants shall not use property acquired for any purpose neither dangerous nor injurious."

But not yet is it evident, that the city may not attach a condition upon the conveyance through its streets of a commodity to be used by its inhabitants, that is to say, to a special use, though it be adapted to another use, in which it is neither dangerous nor injurious. Suppose, for example, a city should determine that it is advisable for the purpose of confining the laying of smaller pipe in a certain street, that gas should be used in a certain part of a city for one purpose only, and concede that this requirement of smaller pipe was in fair discretion, why might not this pur-

pose be carried over to restriction in use by the inhabitants of a city? Would it not seem, then, that ownership by the purchaser of the gas might not be conclusive of the question of use? Perhaps, however, the use by the court of the words, "any purpose neither dangerous nor injurious," shows it does not disagree with an affirmative answer to our query. It comes down then merely to a condition being in furtherance of some public purpose restrictive of one's use of his own—especially when streets and alleys are established for the benefit of the inhabitants of a city and not as means whereby their private rights in their homes or business may be unduly restricted.

The case we are considering relies on a decision by the Supreme Court of Ohio, which held a condition void as to the grantee of a franchise in the use of a city's streets. State v. Traction Co., 64 Ohio St. 272, 60 N. E. 291, affirming S. C. 10 Ohio C. C., Dec. 212. *A fortiori* it seems to us would an arbitrary condition, not subserving, but militating against, ordinary rights of people generally, fail of any recognition. The latter would show that municipal officers had transcended their powers as trustees.

In this latter case the state, on the relation of the attorney general claimed ouster against a street railway for carrying express matter and freight through a city, when its council only had granted it permission to carry passengers and their ordinary baggage or packages in hand. The reasoning of the court was that a city's streets were subject to *regulation* within the uses contemplated by the original proprietor of the surface, which he had dedicated to use as a street. Therefore it was thought, that notwithstanding permission may be refused a street railway to go upon a street, yet being there by permission, conditions may not reduce use below such contemplation. It is, in the view of the court, the abutter who is principally to be considered, and his right is in the ordinary uses of the street being preserved.

Further it is said the city is but an agent of the state in granting permission for a street railway to occupy a street and by such act it exhausts its power. Its power after that is regulation of its use. Its principal has given it no right to attach conditions to a grant.

It has seemed to us, that instead of cities and villages having the absolute right to bar from the use of its streets and alleys public service corporations, proposing to supply its inhabitants with necessities such as light and heat, when beyond temporary inconvenience no sort of interference with public use is contemplated, there should be given right to occupy them under regulations for tearing up and restoring to order. The right to refuse permission is but a grant within the theory of regulatory control and nothing more. Under that theory, of course, conditions to occupation, which in no way concern regulation, should not be recognized, and any attempt to impose them rightly should be held inconsequent. Any other thought is on the theory of the city owning the streets as a private proprietor owns property, and, even he might encounter some obstruction in the attaching of conditions, which had a plain tendency to monopoly. That inquiry we do not try to pursue.

NOTES OF IMPORTANT DECISIONS

INSURANCE—POWER OF OFFICER TO RATIFY CHANGE OF OWNERSHIP AFTER LOSS BY FIRE.—We have considered in this Journal demand of payment of an overdue instalment note as reviving insurance (76 Cent. L. J., 21) and waiver of notice and proofs after time for furnishing same has expired (id. 100) and here is considered the right of an officer of a mutual insurance company to fix a liability on it which would not otherwise exist. Harper v. Michigan Mut. Tornado, Cyclone & Windstorm Ins. Co. (Mich.) 139 N. W. 27.

The facts show that certain owners were members of such a company, their store building being insured therein. Membership meant having a policy of insurance in the company, conducted on the mutual plan. Upon a member selling the policy by assignment, approv-

ed by the company's secretary, insured succeeded as the purchaser of the property. In this case the assignment was made November 8, the property destroyed by cyclone November 11, and the secretary approved the assignment November 18. There was a recovery in the court below upon its being submitted to the jury upon a question of fact of the company's secretary being aware or not of the building having been already destroyed. The jury finding that he was, rendered a verdict for plaintiff. The Supreme Court reversed without a new trial.

The reversing court said: "We will assume that when the secretary indorsed his approval of the assignment he knew that the building had been destroyed, and that he intended by his act to receive the policy so as to make it cover a loss that had already occurred. * * * Boldly stated plaintiff's proposition is this: That after his building was destroyed, he could effect an insurance upon it through the wrongful act of the secretary. This is not a case of waiver, and is not governed by the rules laid down in the many cases cited by plaintiff. It is a case where if plaintiff's contention could prevail, defendant's secretary would be permitted to take $1,500 from members of this defendant organization and present it to plaintiff. This is not insurance. It is vicarious philanthropy."

Yet how is this any different from the other cases we considered? In one of them there was a suspension of vitality subject to revivor, just as here, and in the other a complete accrual of forfeiture. Yet the companies were held. But the mutual feature seems in this case to have had some influence on the court's mind. But should it have any? One insurance company is in business just as another, and scope of authority in agents ought to be as to one just as to the other. Insurance principles will not unravel these distinctions. It seems, however, that the ruling was sound, because such an approval is not within the scope of an officer's agency. His authority is in the carrying of business, not in committing his principal to liability outside of "business."

RECENT DECISIONS IN THE BRITISH COURTS.

There is in this country a difference in the practice of companies regarding the purchase of their own debentures or debenture stock for cancellation. The purchase may or may not be in the open market, according to the circumstances and to the provisions of the Trust Deed (if any). It appears to be the practice in some cases for the vendor to execute a transfer in favor of the company, which transfer is stamped with an ad valorem stamp. On the other hand, it is simpler and less costly to carry out the transaction by executing a form of discharge which is signed by the transferrer, which form of discharge is liable merely to a stamp duty of 1d., inasmuch as it is a mere receipt. (See Firth v. Inland Revenue Commissioners, 1904, 2 K. B. 205.) This we understand to be a common practice. The question is which of these two forms of procedure is correct? The doubt would seem to be whether such a transaction is really a purchase at all, or whether is not merely in substance a redemption of the usual type. In George Routledge and Sons, Limited (1904 2 Ch. 474), Buckley, J. (as he then was), described the effect of a similar transaction thus: "The company had become the assignee of its own debt, and become bound to pay itself £100 and interest. It had also become the assignee of its own undertaking by the way of charge to secure the payment. The result to my mind is that the debt and the security were both absolutely gone. A man cannot be the assignee of his own debt, and cannot be mortgagee of property of which he is also mortgagor." On the face of it, then, the transaction may appear to be a sale, but in substance it appears to be rather a redemption, possibly by payment of the debt in full, or more probably by a greater or a lesser payment (according to the market price), the bargain being to redeem and take a surrender of the security at an agreed figure. If this be so. To have a transfer executed would appear to be inviting an ad valorem stamp duty, which, when the real nature of the transaction is looked into does not appear to be chargeable. Sooner or later, it is likely that the courts will have to decide the matter—and there is room for much argument on both sides. Till then the method by transfer should be avoided.

In Scotland the only form of effective security recognized by law is assignation duly completed, by either delivery, intimation, or

registration as the case may be. In England on the contrary, there is the doctrine of equitable mortgage which in certain circumstances makes deposits of documents tantamount to granting a security over the subjects they represent. In a recent Privy Council case it was held that under the Indian Transfer of Property Act, 1900, a deposit of an insurance policy by way of security for a debt without writing was ineffective. This brings the Indian law into line with Scots Law and abrogates the English rule which formerly prevailed in India.

Another Privy Council case, also from India is of interest. A bank made advances on cotton deposited with them by a merchant who was also a warehouseman. It turned that he had fraudulently pledged a third person cotton warehoused with him. It was held that the bank were in good faith and not liable to the third person for the value of the cotton which the pledgor had used for his own purposes.

A decision of some importance to traders arising out of detention of goods in transit during the railway strike of last summer was before the divisional court recently on appeal from the Bristol County Court. The facts of the case were that a package received in the ordinary course by a railway company for transit was delayed by the general railway strike in which the company's servants were involved, and as the contents were deteriorating through the heat the stationmaster sold the consignment for what it would fetch. The consignors sued the railway company for damages for breach of contract to deliver, and the County Court judge found in their favor on the ground that the delivery was prevented by the default of the railway company's own servants. In support of their appeal against this decision the railway company relying on Hick v. Raymond and Reid, decided in 1893, contended that in calculating what was a reasonable time for delivery regard must be had to all circumstances, and that amongst these must be included a strike of the servants of the carriers so long as it was not occasioned by their own (the carriers) default. This contention was upheld by the Divisional Court, and as in the opinion of the court there was no evidence of default by the company they were held entitled to succeed.

The question of the railway company's right to sell the consignment was settled by agreement between the parties in view of the appeal being allowed, with the object of avoiding a new trial upon that point, but it may be noted that Mr. Justice Scrutton (who with Mr. Justice Ridley heard the case) remarked that the doctrine of a sale by a carrier as an agent of necessity, applied to the case of carriage by land as well as to carriage by sea, provided the necessary ingredients existed, viz., a real necessity for the sale and the practical impossibility of obtaining the owners' instructions as to what should be done.

The owners of the British Stanard, totally lost in 1910, sued the underwriters for recovery under the policy of insurance on the ship. The court held, following the House of Lords decision in the Gunford case, that the policy was void because the owners had concealed the fact that they had another insurance on the boat. Now it has emerged that the builders of the British Standard had contracted with her owners for payment by installments, and to secure same had received a mortgage of the vessel and an assignment of her policies. They now claimed to recover from the underwriters in respect of the total loss of the ship, arguing that although the policy might be bad against the immediate assured, it was good as against a bona fide assignee. But the court again found the policy void, holding that a defense of concealment of a material fact in connection with a policy of marine insurance is a good defense even against an innocent assignee of the policy. The decision emphasizes the basic principle of the contract of insurance, whether marine, life, accident or guarantee, namely, full and candid disclosure of all facts materially affecting the risk. Obviously it has a bearing on the risk to know whether the boat is already heavily insured. In the case we have just noticed, reference was made to the hardship which the ship's builders sustained by reason of the fact that having trusted the owners of the British Standard to make the proper disclosures, the policy was disputed because the proper disclosures were not made. The judge expressed sympathy, but declared that to find in favor of the mortgagees would revolutionize the position of underwriters, and entirely shake the basis on which their business was done, which is that they are entitled to rely as against all persons interested either at the time the policy was made or afterwards, upon proper disclosures and true representations having been made when the policy was first negotiated.

DONALD MACKAY.

Glasgow, Scotland.

POWER OF COMMON COUNCIL TO DIVERT SINKING FUND.

Where power is conferred, either by a general statute or by a direct vote of the people, to levy and collect taxes to provide a fund for a specific purpose—e. g. a sinking fund to pay installments of interest and the principal on bonds of the municipality—has the common council of such municipality power to divert the fund thus raised to any other legitimate purpose? The rights and powers of a common council in dealing with a sinking fund, or any other fund dedicated to a specific purpose, which has been duly established, is governed by the state constitution, by the charter of the municipality, and by the provisions of the ordinance creating and setting apart the special fund.

The constitution of California,[1] and probably the same is true in the other states, provides regulations touching the moneys, assessments and taxes belonging to or collected for the use of any county, city, town or other public or municipal corporation, and requires them to be deposited with the treasurer or other legal depositary, to the credit of such county, city, town, or other corporation, respectively, for the benefit of the funds to which they respectively belong. Municipal charters usually contain provisions regulating the creation of a bonded indebtedness and the establishment of a sinking fund for its payment. The ordinance by which a municipal bonded indebtedness is authorized, usually provides for the establishment of a sinking fund to pay the installments of interest and principal at or before maturity, and fixes the rate of taxation to accumulate and maintain the fund. A fund so raised is dedicated to a specific purpose and is impressed with a trust for that purpose. Can it be used for any other legitimate purpose while the original purpose remains unaccomplished?

The Supreme Court of North Carolina has answered this question affirmatively.[2] In the course of the opinion the court says: "We know of no statute nor any rule of law or a public policy which prevents county commissioners from applying a tax professedly for one purpose, to any other legitimate purpose. . . If they can not apply the proceeds of such a tax otherwise than for its professed purpose, what would become of it if the purpose became inexpedient or impossible, or of the excess, if by chance an excess was left after the purpose was accomplished?

This case seems to stand alone in this holding. The court, in the opinion, cites no authorities, and it is not found that this case has ever been cited. The decision is thought not to be sound in principle, and surely is not in harmony with many well-reasoned cases.

There are two well recognized exceptions in which the general rule of law here discussed does not apply, which exceptions cannot be considered further at this time than simply to point them out. One of these exceptions is where the bonds, to pay which a sinking fund is established and accumulated, are invalid; because in such a case the fund received to pay installments of interest and the principal, is not impressed with a trust, and the general rule of law governing a trust fund does not apply.[3] Another exception to the general rule is where the tax levied to create the fund is excessive, and the fund raised is more than is required for the purposes for which established and collected; the surplus is not impressed with a trust.[4]

(1) Const. 1879, art. XI, §§ 16, 17, 18.

(2) Long v. Commissioners of Richmond County, 76 N. C. 273. In this case, however, the court admit: "There may perhaps be an exception where a tax is levied by a special authority from the legislature, or upon the vote of the people, which would not otherwise be lawful."

(3) Wurth v. City of Paducah, 116 Ky. 403, 105 Am. St. Rep. 225, 76 S. W. 143. See, also, Irwin v. Exton, 125 Cal. 622, 58 Pac. 257, where it was held that the bonds being invalid the money raised to pay the principal and interest might be carried into the general fund.

(4) Board of Education of City of Paducah v. City of Paducah, 108 Ky. 209, 56 S. W. 149.

According to the weight of decision,[5] where a fund has been provided and dedicated to a specific purpose, neither the common council, nor any board or body of the municipality, can divert the money in such fund, or any portion of it to any other purpose than that to which it is dedicated—e. g. in the case of a sinking fund, (1) to the payment of installments of interest on outstanding bonds, and (2) the redemption of the bonds at or before maturity—as long as that purpose is unaccomplished; e. g. as long as there are bonds outstanding.

There are several reasons why the fund cannot be diverted. In California, and perhaps in other states, the constitution prevents such a diversion.[6] Where a common council, either by general statute or by a direct vote of the people, is empowered to pass an ordinance authorizing a bonded indebtedness and to provide for its payment, by the passage of such ordinance providing for a sinking fund, and fixing the rate of taxation to create or accumulate and maintain such fund, such sinking fund becomes an established fact, and the common council of the municipality, in so far as the grant of power in the premises is concerned, becomes functus. The only right and power conferred upon the common council is the right to exercise a specific power. The power granted in such a case is not a delegation to the common council of legislative power over a specific subject. The sinking fund having become an established fact, through the passage of the ordinance providing therefor, at once passed beyond the jurisdiction of the power and control of the common council.[7]

Another matter that must not be lost sight of is the fact that that the supposed ordinance, being valid when passed and approved, pursuant to a power thereto fully given, the establishment of a sinking fund and the fixing and declaring the rate of tax-levy therefor, the city council has no power subsequently to in any way interfere with such ordinance, with the sinking fund, or with the tax rate provided, to the detriment or injury, or to the possible detriment or injury of any bondholder, while any bonds sold and outstanding are unredeemed. This point is forcefully discussed by the Supreme Court of Texas in a case decided June 22, 1905,[8] in which the court says:

"The contract for the bonds being valid when made, inclusive of the stipulation for tax rate to be levied for their payment, any subsequent legislation, whether consisting of a legislative enactment or municipal ordinance passed under legislative authority, impairing the obligation of the contract, either as to its validity or means of substantial equivalent, would in so far be enforcement, as by withdrawing or limiting the taxing power without providing a utterly void as violative of the contract clause of the national constitution."[9]

(5) Carter v. Tilghman, 119 Cal. 104, 51 Pac. 34; Chamberlain v. City of Tampa, 40 Fla. 74, 23 So. 572; Kager v. Hunter, 102 Ga. 76, 29 S. E. 141; Town of Aurora v. Chicago, B. & Q. R. Co., 119 Ill. 246, 10 N. E. 27; State ex rel. County Attorney v. City of Emporia, 57 Kan. 710, 47 Pac. 833; Collins v. Henderson, 74 Ky. (11 Bush) 74; Board of Education v. Board of Trustees of Public Library, 113 Ky. 234, 68 S. W. 10; State ex rel. Brittin v. City of New Orleans, 139 La. 110, 33 So. 102; Kelly v. City of Minneapolis, 63 Minn. 125, 30 L. R. A. 281, 65 N. W. 115; State ex rel. Hopper v. Cottengin, 172 Mo. 129, 72 S. W. 498; Union Pac. R. Co. v. County of Dawson, 12 Neb. 254, 11 N. W. 307; Landenslager v. Atlantic City (N. J., July 10, 1912), 83 Atl. 898; In re Limitation of Taxation, 3 S. D. 456, 54 N. W. 417; City of Sherman v. Williams, 84 Tex. 421, 31 Am. St. Rep. 66, 19 S. W. 66; City of Austin v. Cahill, 99 Tex. 172, 88 S. W. 542; State ex rel. Barton v. Hopkins, 12 Wash. 602, 41 Pac. 906; State v. Haben, 22 Wis. 660; City of New Orleans v. Fisher, 180 U. S. 185, 45 L. ed. 487, 21 Sup. Ct. 437; Ranger v. City of New Orleans, 2 Woods 128, Fed. Cas. No. 11, 564; Coler v. Board Com'rs., 87 Fed. 257.

(6) Art. XI., §§ 16, 17, 18.

(7) See Landenslager v. Atlantic City (N. J., July 10, 1912), 83 Atl. 898.

(8) City of Austin v. Cahill, 99 Tex. 172, 88 S. W. 542.

(9) Const. U. S. art. I, § 10; Murray v. Charleston, 96 U. S. 436, 24 L. ed. 760; City of Mobile v. Watson, 116 U. S. 289, 29 L. ed. 620, 6 Sup. Ct. 398. The result would be to require the courts to pursue the same course and remedies in the enforcement of the contract as they would have pursued had such invalid legislation never existed. Louisiana v. Pilsbury, 105 U. S. 278, 26 L. ed. 1090; United States ex rel.

The city treasurer, as the sinking fund is collected and paid in, becomes the holder—and so far as the common council are concerned—is the owner of the sinking fund as a trustee for the purpose of accumulating the fund and paying out the money as provided in the ordinance creating the fund.[10]

As was well said by the Supreme Court of Florida,[11] "the city council is invested with a large discretion in administering the city's financial affairs, but this discretion does not authorize them to divert taxes, set aside for a special purpose, to other purposes, so long as the special purpose exists." The reason for this is, as is pointed out by the Supreme Court of Illinois,[12] the tax having been levied for the special purpose to raise a special fund with which to pay bonds, the fund, when collected being a special fund, "it could not lawfully be used for any other purpose than that for which it was raised. It was a trust fund in the hands of the town officers. They were charged by law to see to its faithful application." The city of Emporia passed an ordinance and levied a tax to create a fund for the purpose of erecting a city building. After the fund was collected the mayor and city council sought to turn this special fund into the general fund, and the Supreme Court of Kansas said this could not be done; and that the fund could be used for the purpose for which it was raised, only.[13] A like holding was made in the case of the Union Pacific Railroad Co. v. County of Dawson,[14] in which the county commissioners sought to turn a special fund raised by a tax levy to create a sinking fund to pay the principal and interest on a public loan, into the general fund of the county. This principle is far reaching. In the case of city of Sherman v. Williams,[15] the city tax collector having failed to pay over the taxes collected to meet the obligations of the city on an outstanding bond issue to aid the construction of a railroad, suit was brought against him and his sureties on his bond, which suit was thereafter compromised by the tax-collector conveying to the city certain property. The city rented and collected the rent from the property thus conveyed, and turned the rents thus collected into the general fund and not into the fund for the payment of the outstanding indebtedness. Under a judgment thereafter recovered against the city on another claim an execution was levied upon the property conveyed to the city by the tax-collector; and the Supreme Court held that the property, when conveyed to the city in settlement of the defalcation in the special fund became impressed with the same trust as the fund itself, and was not subject to execution to pay a judgment against the city on any other claim.

JAMES M. KERR.

Pasadena Cal.

Wolff v. City of New Orleans, 103 U. S. 358, 26 L. ed. 395; United States ex rel. Von Hoffman v. Quincy, 71 U. S. (4 Wall.) 535, 18 L. ed. 403; City of Galena v. Amy, 72 U. S. (5 Wall.) 705, 18 L. ed. 560; Seibert v. Lewis, 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. 1190.

(10) Commissioners v. Walker, 6 How. (Miss.) 143, 38 Am. Dec. 433; In re City of New York, 200 N. Y. 138, 93 N. E. 689.

(11) Chamberlain v. City of Tampa, 40 Fla. 74, 23 So. 572. See, also, State ex rel. Barton v. Hopkins, 12 Wash. 602, 41 Pac. 906.

(12) Town of Aurora v. Chicago, B. & Q. R. Co., 119 Ill. 246, 10 N. E. 27.

(13) State ex rel. County Attorney v. City of Emporia, 57 Kan. 710, 47 Pac. 833.

(14) 12 Neb. 254, 11 N. W. 307.

LEASE—TERMINATION BY OPERATION OF LAW.

GREIL BROS. CO. v. MABSON.

Supreme Court of Alabama, December 19, 1912. Rehearing Denied Feb. 13, 1913.

60 So. 876.

A lessee, under a lease of "the barroom and fixtures known as the W. Hotel bar * * * for occupation as a bar, and not otherwise," was relieved from performance, and from his liability for rent subsequent to January 1, 1909, by the prohibition law, subsequently enacted, effective on that date, where he vacated and surrendered the premises, since the property was leased solely for use as a place for selling intoxicating liquors; the words "bar" and "barroom" having a more restrictive meaning than "saloon," and meaning a place from which intoxicating liquors are to be sold.

DOWDELL, C. J.: (1) The lease, as entered into by the parties, says "that the parties

(15) 84 Tex. 421, 31 Am. St. Rep. 66, 19 S. W. 606.

of the first part have this day leased to the parties of the second part the following premises in the city of Montgomery, Ala., viz.: The barroom and fixtures known as the Windsor Hotel bar, and located in the Windsor Hotel building on Commerce street, for occupation as a bar, and not otherwise." It will be noted that the lease includes the barroom and fixtures inseparably, and provides that the room is to be occupied "as a bar, and not otherwise." Appellee was bound, under this contract, to have permitted the use of the property as a bar, and the appellant was prohibited from using it for any other purpose. 24 Cyc. 1062-1064, and note 6; Parkman v. Aicardi, 34 Ala. 393, 73 Am. Dec. 457; McDaniel v. Callan, 75 Ala. 327.

(2) "Bar" and "barroom" seem to have a more restrictive meaning than "saloon," and by the great weight of authority mean a place from which intoxicating liquors are to be sold. Words and Phrases, vol. 1, p. 704; Town of Leesburg v. Putnam, 103 Ga. 110, 29 S. E. 602, 68 Am. St. Rep. 80; City of Spokane v. Baughman, 54 Wash. 315, 103 Pac. 14. It is therefore evident that the main, and, indeed, the sole, purpose for which the property was leased was that it should be used as a place for selling intoxicating liquors. Therefore, did the said business become totally prohibited by the subsequently enacted state prohibition law? We think that such was the result, and that the said prohibition law forbade the very business and purpose for which the property was leased. The general rule is that, where the performance of a contract becomes impossible subsequent to the making of same, the promisor is not thereby discharged. 9 Cyc. 627. But this rule has its exceptions, and these exceptions are where the performance becomes impossible by law, either by reason of a change in the law, or by some action or authority of the government. 9 Cyc. 629, 630; Burgett v. Loeb, 43 Ind. App. 657, 88 N. E. 346. It is generally held that, where the act or thing contracted to be done is subsequently made unlawful by an act of the Legislature, the promise is avoided. Likewise, where the performance depends upon the continued existence of a thing which is assumed as a basis of the agreement, the destruction of the thing by the enactment of a law terminates the obligation. Hearst v. Tenn. Brew. Co., 121 Tenn. 69, 113 S. W. 364, 19 L. R. A. (N. S.) 964, 130 Am. St. Rep. 753; Am. Mer. Exchange v. Blunt, 102 Me. 128, 66 Atl. 212, 10 L. R. A. (N. S.) 414, and note, 120 Am. St. Rep. 463, 10 Ann. Cas. 1022; Lorillard v. Clyde, 142 N. Y. 456, 37 N. E. 489, 24 L. R. A. 113; Wood v. Building Ass'n., 126 Iowa, 464, 102 N. W. 410; School District v. Howard, 5 Neb. (Unof.) 340, 98 N. W. 666; Hooper v. Mueller, 158 Mich. 595, 123 N. W. 24, 133 Am. St. Rep. 399; Paige on Contracts, vol. 3, §§ 1363-1370; Jamieson v. Natural Gas Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652. The case of Hearst v. Tenn. Brew. Co., 121 Tenn. 69, 113 S. W. 364, 19 L. R. A. (N. S.) 964, 130 Am. St. Rep. 753, is quite similar to the case at bar. There a place was rented as a whisky saloon, and before the expiration of the term the sale of liquor was made unlawful, and the court held that the lease was terminated by the adoption, during the term, of a law making the sale of liquor illegal. It is true that the word "saloon" seems to have been used instead of "bar" or "barroom," but the opinion indicates that it related to a whisky saloon, instead of a "saloon" in its broader meaning, and as is defined in our own case of O'Byrne v. Henley, 161 Ala. 620, 50 South. 83, 23 L. R. A. (N. S.) 496.

In the case of Burgett v. Loeb, 43 Ind. App. 657, 88 N. E. 346, the Indiana court held that a lease of a place for the sale of whisky did not become inoperative, because the lessee could not get a license to sell during some of the years covered by the lease. The reason given being that his inability to use the premises for the purpose for which they were rented did not arise from a change of the law, so as to prohibit the business, but resulted from the rejection of his application for a license, and which was a risk that he assumed. The court, however, recognized the general principle of law heretofore stated, as the opinion says: "It is the general rule that, where the performance of a contract becomes impossible subsequent to the making of the contract, the promisor is not thereby discharged. To this rule there is a well-established exception, viz., where the performance becomes impossible by a change in the law, the promisor is discharged. The facts here presented do not bring the case at bar within the exception. Appellant did not discontinue his business because of a change in the law, but because of its application." We therefore hold, that, as the property was leased for the sole purpose of conducting a barroom, or a place for selling intoxicating liquors, the business was destroyed or prohibited by the enactment of the prohibition law; and the defendant was thereby relieved from performance of the contract after the law became effective, and was not liable for rent after January 1, 1909, if it vacated the premises and surrendered the property, as set out in the special pleas.

This holding is different from the result in the O'Byrne Case, supra, as the court there held that the lease was not terminated by the prohibition law, as the business for which the place was rented was not necessarily prevented by said law. There the lease was for a "saloon," and the definition adopted by the court made it much more comprehensive than a "bar" or "barroom," and the court dwelt upon the fact that the tenant had the right to and could conduct a saloon without disposing of intoxicating liquors; and that the business for which the place was rented was not necessarily abolished or prohibited by law. Again, the lease there related only to the building. Here the lease covered the room and bar fixtures, and the property was to be used "as a bar, and not otherwise," and, as set out in the pleas, was surrendered the day before the prohibition law went into effect. On the other hand, the law and reasoning, as laid down in the opinion in said O'Byrne Case, is in full accord with the present holding and with the weight of authority.

The case of Goodrum Co. v. Potts-Thompson Co., 133 Ga. 776, 66 S. E. 1081, 26 L. R. A. (N. S.) 498, is not only opposed to the present holding, but is contrary to the overwhelming weight of authority.

The case of Houston Ice Co. v. Keenan, 99 Tex. 79, 88 S. W. 197, is not opposed to the present holding. The court in said case recognized the correct exception to the general rule that performance of a contract will not be enforced when made impossible by a change in the law, but held that there was no change that prohibition resulted from a local option election held under a law which was in existence when the lease was made; and that the lessee should have protected himself by a clause in the lease against a contingency then authorized by law. Here the pleas do not set up prohibition under an election held under a local option law existing when the lease was made, but an act of the Legislature passed after the lease was made.

The case of San Antonio Brewing Co. v. Brents, 39 Tex. Civ. App. 443, 88 S. W. 368, and Kerley v. Mayer, 10 Misc. Rep. 718, 31 N. Y. Supp. 818, upheld the lease, upon the theory that the lessee could use the premises for other purposes, under the terms of the lease; that the provision as to a first-class whisky saloon did not restrict the use to a liquor saloon, but merely restricted the character of that business, and the lessee was therefore authorized to use the building for any other legitimate purpose.

As this case seems to have been tried upon a misconception of the law, which, if applied upon the next trial as above indicated, should eliminate many of the questions involved in the present appeal, we do not deem it necessary to consider all of the assignments of error. It is sufficient to say that the trial court erred in sustaining the plaintiff's demurrers to defendant's special pleas 3, 4, 5, and 6, and the judgment is reversed, and the cause is remanded.

Reversed and remanded.

NOTE.—*Eviction by Statute Making Business Unlawful.*—It is to be greatly doubted that the holding in Goodrum Co. v. Potts-Thompson Co., 133 Ga. 776, 66 S. E. 1081, 26 L. R. A., N. S. 498, is "contrary to the overwhelming weight of authority." This case is greatly bottomed on Lawrence v. White, 131 Ga. 840, 63 S. E. 631, 19 L. R. A., N. S. 966, where the reasoning is greatly more elaborated. But the Goodrum case states the general proposition quite differently than it appears in the instant case. The latter regards the leasing and agreement to pay rent as in the nature of an executory contract whose performance is arrested by operation of law, and so does Hearst v. Tenn. Brew. Co., 121 Tenn. 69, 113 S. W. 364, 119 L. R. A., N. S. 964, which is among the cases it cites. But the Lawrence case regards it as executed contract whereby a party has voluntarily created a duty or charge upon himself. In such case Chancellor Kent speaks of it having become fixed and settled in the common law that "he ought to abide by it when the other party is not in fault, and when he might have provided, if he had chosen, against his responsibility in case of such accidents" (those which take away the absolute or lawful enjoyment of the premises). The instant case shows that this rule would not be recognized because it says: "Where the performance depends on the continued existence of a thing which is assumed as a basis of the agreement, the destruction of the thing by the enactment of law terminates the obligation," or if it does not, it makes other destruction not by fault of the tenant different than destruction by law. Why this difference?

The case of Am. Mer. Exchange v. Blunt, 102 Me. 128, 66 Atl. 212, 120 Am. St. Rep. 463, 10 Ann. Cas. 1022, was not a case of leasing but an agreement for personal services—an employment contract—and the very elaborate note in 120 Am. St. Rep. cites no cases as to leasing.

The case of Hooper v. Mueller, 158 Mich. 595, 123 N. W. 24, 133 Am. St. Rep. 399, also cited by the instant case as on its side, seems to us to look somewhat the other way. The court said: "The local option law which went into effect in that county during the term of this lease rendered the performance of the contract on the part of the plaintiffs (lessors) impossible. They had agreed that in case of failure to furnish and secure bondsmen for defendants as retail liquor dealers, the lease should become void. It may well be said that they contracted with reference to this contingency which has arisen, as well as to any other circumstances which would intervene, either from their own acts or otherwise. This was a part of the consideration which induced the defendants to enter into

the lease." Here there was an executory contract running with the lease and this was said, in effect, to put it on a different footing than a lease not providing against contingencies. Wood v. Building Assn., 126 Iowa 464, 102 N. W. 410; Lorillard v. Clyde, 142 N. Y. 456, and Jamieson v. Natural Gas. Co., 128 Ind. 555, do not refer to leases, and the principles they lay down were not touched upon in the Georgia cases. This leaves authority with specific reference to leases and their being avoided by statute quite scant so far as the instant case's search is concerned, and it appears industriously to have sought such cases.

As to contrary cases besides those in Georgia. Thus San Antonio Brewing Co. v. Brents, 39 Tex. Civ. App. 443, 88 S. W. 368, should be read in subordination to Houston Ice and Brewing Co. v. Keenan, 99 Tex. 79, 88 S. W. 197, the former having been decided May 17, 1905, and the latter May 25, 1905. The latter case held that a lease providing that the premises should be used for a saloon business was not rendered illegal nor the lessee absolved by the adoption of local option in the county. This law was adopted between execution and delivery of the lease and the beginning of the term. This court adopted an opinion of another of Texas Court of Civil Appeals. Part of that opinion said: "The stipulated use to which the demised premises were to be put was entirely legal when the lease contract was executed. That such use might become illegal was a probability well known to appellant at the time. * * * This was a probable contingency that an ordinarily prudent man should have foreseen and provided for in this contract, and, having failed to do so, he took the risk upon himself and must abide the consequences." For this is cited Newby v. Sharpe, 8 Ch. Div. 39, which pursues this precise line of reasoning. It probably would have been that had defendant insisted on such a provision as the court indicates, the rental price would have been advanced. The Brents case goes on the theory that there was no limitation on the use of the property for any other purpose and therefore the enactment of the local option law did not avoid the lease. Kerley v. Mayer, 31 N. Y. Supp. 818, 10 Misc. Rep. 718, which case was affirmed without opinion in 155 N. Y. 636, also goes upon this theory, and this seems to us a much fairer way to construe leases than appears from the instant case. Unless it is too clear for dispute, it ought not to be thought that though a particular kind of business is mentioned, occupancy is thus conditioned unless this is clearly expressed. The lessor should not be thought to be trying to entrap lessee, and lessee on the other hand should not be allowed to throw back upon the lessor property which cannot be used as lessee intended to use it. The reach of such a designation of use should take into consideration not legality of use, but legality of occupancy.

In Miller v. Maguire, 18 R. I. 770, 30 Atl. 966, it was held that a saloon being put out of business by the erection of a public school near it did not constitute an eviction so as to annul a lease or suspend the rent, the premises being leased for the sale of liquor. This lease, it was held, did not show that the premises were restricted to such use, and lessor was not at fault that he was unable to do with them as he intended.

In Barghman v. Portman, 12 Ky. L. R. 342, 14 S. W. 342, it was broadly said that where the sale of liquor was one of the principal sources of revenue in a hotel lease, the lessee took the premises subject to legislative regulation and the landlord, an ardent advocate of local option, estopped himself in no way from claiming all that was stipulated for.

Whatever of decision there is on this question seems more greatly, we think, against than in support of the instant case. It relies on a principle which the opposing cases think not applicable and it also seems to us it construes a lease too strictly in regarding designation of business as exclusive. This designation, it seems to us, should be taken as permissive and not exclusive. C.

ITEMS OF PROFESSIONAL INTEREST.

NEW YORK'S COURT OF LEGAL ETHICS—RECENT OPINIONS.

Lawyers all over the country have shown considerable interest in the decisions of the Committee on Professional Ethics of the New York County Bar Association. This committee meets at regular intervals and answers inquiries propounded by members of the local association with reference to professional conduct as constituting a violation of the Code of Ethics. The code thus construed are the Canons of Professional Ethics,[1] of the American Bar Association which is now the prevailing authority throughout the country.[2]

The decisions handed down recently by this committee are the following:

NEW YORK COUNTY LAWYERS ASSOCIATION.

COMMITTEE ON PROFESSIONAL ETHICS.

ANNOUNCEMENT.

In answering questions this Committee acts by virtue of the following provisions of the by-laws of the Association, Article XVI, Section III:

"This Committee will be empowered when consulted to advise inquirers respecting questions of proper professional conduct, reporting its action to the Board of Directors from time to time."

QUESTION NO. 22.

"A," an attorney, represents two creditors of "C," and is desirous of filing a petition in bankruptcy against "C." "A" knows that "B," an attorney, represents a third creditor of

(1) 75 C. L. J., 419.
(2) 75 C. L. J., 385.

"C," and suggests to "B" that "B" should have his client join with "A's" clients in signing and filing the petition in bankruptcy.

This was done under an arrangement between "A" and "B" with the knowledge of the clients, that if "A" represents the receiver in bankruptcy, the fees which "A" thus receives will be divided between "A" and "B." Is this considered unethical?

I should like to have this question answered entirely irrespective of whether "B" is to do any work or not in connection with the receivership.

ANSWER TO QUESTION NO. 22.

The Committee does not express any view at present as to the propriety of an attorney for petitioning creditors assuming also to represent the receiver and thus sustain two-fold obligations that may conflict; yet, since in this district the Federal Court itself undertakes to safeguard by its special order under Rule 20 the propriety of such representation in each particular case, we are of the opinion that the facts recited in the question do not alone constitute unethical conduct.

QUESTION NO. 18.

Is it the opinion of the Committee that an attorney, who has received a retainer, but who has no express agreement with his client for his compensation, may properly notify his client, upon the eve of trial for which he has made preparation, that he will not appear at the trial, nor proceed further with the suit, nor consent to the substitution of another attorney, nor release any of the client's papers in his possession and essential to the proper trial of the action, unless his client pays or secures to his satisfaction the payment of a bill which he has rendered, and which he deems reasonable compensation for his services to the date of his conditional refusal to proceed further in the cause?

ANSWER TO QUESTION NO. 18.

The suggested conduct of an attorney upon the eve of the trial of the case for which he had been retained is unethical and should be condemned.

QUESTION NO. 21.

In the separation action of Jane Doe against John Doe, there were awards of alimony and counsel fee, none of which the defendant paid, having kept out of the State for the express purpose of avoiding these payments. The case was finally tried. The defendant did not appear, resting his defense on a western divorce which our court set aside. The decree, among other things, gave a money judgment for some $2,000 back alimony. There were several appeals from orders and in one instance the defendant was found guilty of contempt and fined several hundred dollars. Plaintiff's attorney served a notice of lien.

Later, the judgment of $2,000 was sent to Philadelphia, where the defendant then was, and a suit was begun on the judgment. Thereupon the defendant entered into a collusive arrangement with his wife whereby all of the various judgments and orders directing the payment of moneys in New York were satisfied, and this satisfaction was set up in a supplemental answer in Philadelphia.

This litigation had continued for years, and the plaintiff's attorney had worked without reward, advancing large sums of money in the litigation. Several judgments for costs consisted largely of printing bills that he had paid. He even advanced moneys to keep the plaintiff from starving, as throughout the entire litigation the defendant kept out of the State and never paid one dollar either in alimony or costs.

The defendant had but one attorney through this litigation, and he was entirely familiar with all the circumstances. Yet he, with a new lawyer representing the plaintiff, drew this collusive agreement, which deprived the plaintiff's attorney of his lien, even for the costs made up largely of printing disbursements advanced by him.

Was this action on the part of the defendant's attorney ethical? If not, what should be done in the matter?

ANSWER TO QUESTION NO. 21.

This Committee uniformly declines to express its views upon the propriety of disciplinary proceedings; and it does not advise persons of their property rights or the means of enforcing them. The attorney's lien and his right to reimbursement were property rights.

We do not regard it as ethically proper for an attorney to enter into or advise any collusive or other agreement to destroy any property right unjustly.

QUESTION NO. 17.

A lawyer who states that he has had great difficulty in securing testimony in behalf of his client from lawyers as to the value of legal services, in a litigation between the client and a former lawyer, involving that value, has applied to the Association to designate lawyers who will act as expert witnesses in his case. His application has suggested the formulation of the following question:

Is it the ethical duty of a lawyer, when called on to give testimony as an expert witness concerning the value of legal services, to testi

fy as a witness giving his opinion of such value on a proper question submitted to him, in a litigation where it is charged that another lawyer has greatly overcharged the latter's client, or may any number of lawyers who are appealed to give testimony respecting the value of such services, the nature and extent of which are not in dispute, decline to testify on the ground that they do not care to express an opinion adverse to a charge made by another lawyer and which is in litigation?

ANSWER TO QUESTION NO. 17.

We are of the opinion that mere considerations of courtesy or fraternity should not deter members of the legal profession from testifying in respect to the value of legal services, when it is contended that a lawyer has overcharged or attempted to overcharge a client, and the controversy is the subject of litigation.

QUESTION NO. 20.

A foreign shipping company, by written contract, employed, as its agent in this port for the period of three years, one Maduro, agreeing that should he be discharged prior to the expiration of that time, he should be paid full salary for the remainder of the unexpired term. Maduro retained the law firm of Port and Starboard to appear for and in the name of the Company in several admiralty litigations; the firm receiving its fees from funds of the Company and appearing of record as its attorneys, not as attorneys of its agent. Prior to the agency's expiration, the Company for alleged cause notified Maduro that it would terminate his employment and send one Colorado to succeed him. Maduro demanded full salary and a settlement of accounts before relinquishing his agency. Colorado, on arriving in this port, was served with a summons in an action brought in the State court by Maduro through Port and Starboard to recover $33,000 of salary for the unexpired term of his agency, and found that these attorneys had also attached $58,000 of the Company's funds in bank; $10,000 of which, however, they released to supply the Company with current funds. He also found that one of the litigations in which Port and Starboard appeared for the Company was actually on trial, so that it was inexpedient to swap legal horses in crossing that stream. The Company, anticipating resistance by Maduro to Colorado's assumption of the agency, cabled the day before the latter's arrival in the port to one Binnacle to represent the Company in the event of such resistance.

The attention of Port and Starboard being called to the fact that they, having been sole attorneys for the Company, were now appearing both for it in said admiralty litigation and against it in the State court, they replied that their action was proper; that the Admiralty Bar being limited in number, a member of it may properly appear for A one day in his suit against B and for B another day in his suit against A.

The Company's allegation of maladministration on the part of Maduro as a ground of his discharge necessarily involved examination, among other things, of the matters out of which arose said pending litigations in which Port and Starboard appeared for the Company.

Queries. (1) Was it professional misconduct for Port and Starboard to bring an action against the Company for its agent and attach the funds in bank, while at the same time acting as attorneys for the Company in pending litigations at a stage when it would have been inadvisable for the Company to substitute other attorneys?

(2) Are the ethical rules for the Admiralty Bar different from those applicable to the Bar at large?

(3) Does it make any difference whether the agent's action against the Company involved matters that Port and Starboard had knowledge of as the Comapny's attorneys?

(4) If the course of Port and Starboard was unprofessional, is it such a grievance as would justify discipline?

ANSWER TO QUESTION NO. 20.

The relation of confidence implied in the representation of the company in the admiralty suits seems to us to have demanded that while it continued, the attorneys should not attach the funds of their client nor accept a retainer against it. We consider that the ethics of the profession should operate in all courts, and that the Admiralty Bar constitutes no exception. We consider the two relations as inconsistent, regardless of whether the action against the company involved matters of which the attorneys acquired knowledge in their professional relations with the company.

This Committee uniformly declines to express its views upon the propriety of disciplinary proceedings, as not within its function.

BOOKS RECEIVED.

Death by Wrongful Act, a treatise on the law peculiar to the action for injuries resulting in death, including the text of the Statutes and an Analytical table of their provisions. Second Edition by Francis B. Tiffany. Price, $6.00. Kansas City, Mo., Vernon Law Book Company. Review will follow.

BOOK REVIEWS.

JONES' STATUTE LAW MAKING IN THE UNITED STATES.

This book is in one volume of about 300 pages, by Mr. Chester Lloyd Jones, Associate Professor of Political Science in the University of Wisconsin. He finds a want for the work in the fact that there is such an increasing amount of legislation in this country that the manner of shaping bills to accomplish the purposes of their introduction should be carefully studied. This is a good thought, but the difficulty in its application lies in the fact, that legislators who contribute mostly to this abundance are generally sufficient unto themselves, no matter how many ineffectual attempts they may have made to produce a statute to get over the hurdle of construction.

But though they may never learn anything from the author of this book, it should be useful to practitioners and judges, who have to wrestle with what they produce. The writer presents his subject in an orderly manner, so that the inquiry to ascertain whether there is any fundamental objections to legislation and its meaning may be aided. Titles, preambles, enacting clauses, language and its uniformity, grammatical construction, repeals, etc., etc., are all considered, and precedents both acceptable and defective are shown.

The book is practical, in style and treatment, and should be of considerable service to bench and bar. The binding is in cloth, the typography attractive to the eye and is published by The Boston Book Company, Boston, 1912.

HARRIS' LETTERS TO A YOUNG LAWYER.

This delightful little volume of letters by an old lawyer to his son is a book to read once and then be drawn to it again by its naivete. It brings a sort of atmosphere into the city lawyer's office which he wishes he could keep there, and it unfolds something of a parallel in experience to the reader in the less pretentious office in the country.

Better than this, however, is the book for the young lawyers in city and country alike. It shows them the human nature and sympathy that are woven into the practice of law in the country and the shrewd, but not cunning, things that these teach in the country and hardly dreamed of in the city. It suggests how the practice of law may be something else than a trade, and that its inspirations do not wholly lie in the principles of jurisprudence. It tends to prove that this sympathy may help to a truer and more wholesome understanding of these principles. The style of the author, Mr. Arthur M. Harris of the Seattle Bar, carries you along easily to the end and the reader will rise from an hour of pleasure when he begins to read, and while he is at it, he might well wish not to be interrupted by a client. If you are not afraid of this feeling, you will get a copy.

The volume is attractive in red cloth binding, small enough to put in your pocket, of large readable type and issued by West Publishing Company, St. Paul, 1912.

HUMOR OF THE LAW.

"My uncle only left me five thousand dollars! Wonder if I could break the will?"

"Sure thing! He must have been crazy to leave you anything."—Boston Post.

"I see an Illinois judge has fined himself for speeding"

"Well, that's no more than just."

"And suspended sentence."

"Well, that's no more than human."—Washington Herald.

There is little of the humorous in the proceedings of the trial courts of the county, for generally it is a serious proposition for all parties concerned. The very nature of the proceedings calls for dignity and decorum, whether it be a fight for life or liberty of a defendant, or the trial of personal and property rights. Occasionally, however, a touch of the humorous will crop out and enliven the trial of a case, especially when the introduction of a little frivolity can have no material effect on the case, and as the old adage has it, "a little nonsense now and then is relished by the wisest men."

Saturday, in the third division of the city court of Birmingham, so ably presided over by Judge John H. Miller, a trial was on in which one of the large service corporations was sued, the plaintiff claiming damages for alleged personal injuries.

In telling the story the Age-Herald of Birmingham, said that when the plaintiff took the stand he stated that he was injured in a street car accident and that "a hole knocked in the back of his head," also that the hole was still there. A physician was called to give expert testimony, who stated on the stand that at the point on the skull where the plaintiff claims he was injured there was a natural depression or "hole."

He felt the head of the plaintiff and stated the hole was there but gave it as his opinion that it came from natural causes, and that nearly everyone had a similar depression.

"You say there is a hole on the back of every person's head," asked the attorney for the defendant company.

"Generally speaking, I do," replied the physician.

"Would you mind examining my head and tell the court whether a depression is there or not?"

"Not at all," said the physician, and feeling the head of the attorney, announced to the court that a hole was there.

Not to be outdone, the attorney for the plaintiff asked the expert to feel his head and tell the court the result of his finding. The physician complied with the request and again told the court that in the back of the head of the attorney for the plaintiff there was a depression.

At this point the hour for adjournment had arrived so Judge Miller "butted in."

"Before you leave the stand," said the judge to the doctor, "I would like to ask you a question. Tell me, is it usual to find hollow places in the heads of attorneys?"

The answer was lost in the laugh that followed and the court adjourned for lunch.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

Alabama....1, 2, 6, 7, 11, 12, 17, 20, 25, 26, 27, 28, 29, 33, 37, 38, 49, 50, 54, 74, 75, 77, 83, 87, 88, 89, 92, 93, 95, 96, 100, 101, 102, 104, 110, 114.
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1. **Bankruptcy**—Discharge.—That, as recited in the deed of an assignee in bankruptcy, there was an assignment to him of the property, and an order of sale, 40 years after the discharge of the bankrupt be presumed, though there has been no actual possession of the land.—Lacey v. Southern Mineral Land Co., Ala. 60 So. 283.

2.——Exemption.—A policy of insurance on the life of a bankrupt which is exempt from liability for the bankrupt's debts under the state law is also exempt under Bankr. Act 1898.—Young v. Thomason, Ala., 60 So. 272.

3.——Mortgage.—A mortgage on a merchant's stock of goods though not fraudulent in its inception held fraudulent as to subsequent creditors by being withheld from record, and was therefore unenforceable in bankruptcy as against them.—In re Jacobson & Perrill, U. S. D. C., 200 Fed. 812.

4.——Pleading.—A petition by a bankrupt's trustee to enforce the execution of the judgment recovered against the bankrupt within four months was not defective for failure to charge that the creditor at the time he recovered the judgment had reasonable cause to believe its enforcement would effect a preference.—In re Petersen, C. C. A., 200 Fed. 739.

5.——Unrecorded Mortgage.—An unrecorded chattel mortgage, being valid as between the parties and general nonlien creditors, under the Georgia law, is not one "required" to be recorded within Bankr. Act.—In re Jacobson & Perrill, U. S. D. C., 200 Fed. 812.

6. **Banks and Banking**—Lien in Deposit.—The lien of a bank for any advance or loan made to the depositor arises when the advance is made, entitling the bank to apply the funds of the depositors to the payment of such indebtedness.—Batson v. Alexander City Bank, Ala., 60 So. 313.

7. **Bills and Notes**—Designatio Personae.—Note for school furniture, signed "Board of Trustees," with signature of "W., Chairman," and "M., Secy.," beneath, with no consideration to them individually, held not enforceable against them personally, where the payee's agent knew they had no intention to bind themselves personally.—Peabody School Furniture Co. v. Whitman, Ala., 60 So. 470.

8.——Gift.—Where a husband, upon making a loan, took a note payable to his wife, it is no defense that at his request she delivered it to the payee, who destroyed it, unless it be shown that the delivery was made as a gift or in pursuance of an agreement supported by a valid consideration.—Croan v. Myers, Ind., 100 N. E. 380.

9.——Indorsement.—Where a note was payable to a corporation and indorsed to plaintiff in the name of the corporation by C., manager, it passed title unless the indorsement was denied by a sworn plea of non est factum.—Kirby v. Johnson County Savings Bank, Ga., 76 S. E. 996.

10.——Pleading.—To defeat recovery by the indorsee of a note for value and before maturity from the apparent owner, the maker must not only plead circumstances causing one of ordinary prudence to suspect that the indorser had no interest, but must plead that the indorsee had actual notice thereof.—City State Bank of Hobart v. Pickard, Okla., 129 Pac. 38.

11.——Testamentary.—A written instrument, whereby the maker promised to pay a sum certain in money at his option before his death or to be collected from his estate thereafter, is not invalid as a testamentary instrument or a promise to make a future gift, but is a good promissory note.—Dorsey v. Hudmon, Ala., 60 So. 303.

12. **Carriers of Goods**—Discrimination.—A contract which gives a shipper the right to remove the goods after their arrival at his convenience is violative of Interstate Commerce Act, as creating an unreasonable preference.—Central of Georgia Ry. Co. v. Patterson, Ala., 60 So. 465.

13.——Limitation of Liability.—If a carrier may limit its liability as insurer of baggage exceeding a fixed value, a contract so limiting its liability does not relieve it of liability for the loss of baggage through its negligence.—Zetler v. Tonopah & G. R. Co., Nev., 129 Pac. 299.

14.——Perishable Freight.—A carrier of perishable freight owes only the duty of exercising reasonable care to protect it from injury, in the absence of any special contract as to the time of delivery.—Pennsylvania R. Co. v. Clark, Md., 85 Atl. 613.

15. **Carriers of Live Stock**—Notice of Injury.—Where, on the arrival of live stock at destination, the agent of the carrier is notified that some of the stock has been injured, and he examines the stock and has opportunity to

ascertain the extent of the injuries, there is a substantial compliance with the shipping contract requiring notice of injury before the stock is removed.—Atchison, T. & S. F. Ry. Co. v. Robinson, Okla., 129 Pac. 20.

16. **Carriers of Passengers**—Joinder.—The superintendent of a street railway company, whose negligence caused an accident, was properly joined with the company as defendant in a passenger's action for resulting injuries.—Emerson v. Butte Electric Ry. Co., Mont., 129 Pac. 319.

17.——Passengers.—The relation of carrier and passenger had terminated when a railroad passenger was assaulted by a trainmen in a hack in which he had taken passage, which was standing near the station in a public street, over which the railroad company had no dominion, so that the company was not liable for the assault.—Southern Ry. Co. v. Burnett, Ala., 60 So. 472.

18. **Chattel Mortgages**—Possession.—An attempt by the holder of an unrecorded chattel mortgage to take possession of the property while in the hands of an officer under an attachment against the mortgagor held ineffective to sustain the mortgage.—Duffy v. Charak, C. C. A., 200 Fed. 747.

19.——Removal of Property.—That a chattel mortgagor was permitted by an assignee of the mortgage to remove the property to another county in which he did not reside did not invalidate the mortgage.—Fife v. Ohio Inv. Co., Ind., 100 N. E. 392.

20.——Waiver.—A mortgagor may waive surrender or cancellation of the mortgage instrument on the mortgagee's recission of a chattel mortgage for fraud.—Batson v. Alexander City Bank, Ala., 60 So. 313.

21. **Commerce**—Commerce Court.—The Commerce Court is not authorized to review the determination of disputed questions of fact by the Interstate Commerce Commission, made after a full and fair hearing, on proper notice, unless the Commission exercised its power in an arbitrary and unreasonable manner, or in violation of petitioner's constitutional rights.—Florida East Coast Ry. Co. v. United States, U. S. Com. C., 200 Fed. 797.

22. **Constitutional Law**—Due Process of Law.—The statutes of Alabama pertaining to the administration of decedents' estates, without notice or citation to heirs or creditors, are not in violation of the due process of law clause of the federal Constitution.—Alabama Great Southern R. Co. v. Hill, Ga., 76 S. E. 1001.

23. **Contracts**—Consideration.—A contract to care for decedent in consideration of his making J. his residuary beneficiary held unsustainable, where J. had previously agreed to perform the same services under contract with J.'s agent.—Hillman v. Young, Ore., 129 Pac. 124.

24.——Consideration.—An agreement by a subscriber to stock to give the defendants a preferred right to buy it was a sufficient consideration for an agreement of defendants to pay dividends on the stock and, at the subscriber's option, to buy the stock at a stated price.—Vickrey v. Maier, Cal., 129 Pac. 273.

25.——Implied Agreement.—The existence of an express contract excludes an implied agreement relative to the same matter.—Loval v. Wolf, Ala., 60 So. 298.

26.——Improvidence.—The hardships imposed by an improvident contract will not of themselves justify a recission.—Capital Security Co. v. Holland, Ala., 60 So. 495.

27.——Invalidity.—A contract executed by a foreign corporation before it had designated a known place of business and an agent as required as a condition precedent to doing business, was void and unenforceable.—Peters v. Brunswick-Balke-Collender Co., Ala., 60 So. 431.

28.——Substantial Performance.—Where a party to a contract has substantially performed and the benefits have been received by the other party, general indebitatus assumpsit lies to recover on the common counts at contract rates, less damages sustained for failure to make complete performance.—Georgia Pine Lumber & Timber Co., Ala., 60 So. 512.

29. **Corporations**—Agency.—A third party in dealing with a large corporation having a great number of agents may rely on the apparent authority of the agent.—Hill v. Southern Ry. Co., Ala., 60 So. 450.

30.——Illegal Dividends.—An action against directors is based on the illegal payments of dividends in fraud of creditors, and the receiver, as the representative of the creditors, may maintain such action.—Stoltz v. Scott, Idaho, 129 Pac. 340.

31. **Courts**—Receiver.—A receiver for a corporation, appointed by a state court, who as such has recovered a judgment in his own state, may maintain an action thereon in another jurisdiction as a judgment creditor, and his description of himself in his pleading as receiver may be treated as surplusage.—McBride v. Oriental Bank of New York, U. S. D. C., 200 Fed. 895.

32 **Criminal Law**—Flight.—To explain his departure after an offense a defendant may show that he was in danger of being mobbed in the vicinity, and that a certain person had made threats of violence against him.—State v. Hogg, Ore., 129 Pac. 115.

33.—Preliminary Proof.—Preliminary proof of the voluntary character of a statement by accused, which was not a confession, was not necessary.—Macon v. State, Ala., 60 So. 312.

34. **Damages**—Ad Damnum Clause.—The amount of damages stated in the ad damnum clause of a declaration does not determine the jurisdiction of the court when the real demand or value of the property otherwise clearly appears and is less than the ad damnum.—Seaboard Air Line Ry. v. Maxey, Fla., 60 So. 353.

35.——Breach of Contract.—The injured party to a contract is entitled to damages for its breach equal to the profits he would have realized.—Hart v. Tremont Lumber Co., La., 60 So. 368.

36.——Intentional Wrong.—One guilty of wrong intentionally, wilfully and maliciously committed is responsible for the injuries which he has directly caused, though beyond the limit of natural and apprehended results.—Garrison v. Sun Printing & Publishing Ass'n, N. Y., 100 N. E. 430.

37.——Pleading.—It is not necessary to the recovery of punitive damages that they be

claimed in the complaint.—Black v. Hankins, Ala., 60 So. 441.

38. **Deeds**—Condition Subsequent.—A court of equity will declare a forfeiture of a conveyance for a breach of condition subsequent, where conveyance shows that it was the purpose of the parties that such should be the effect of a breach.—Shannon v. Long, Ala., 60 So. 273.

39.——Construction.—The rule of strict construction against the grantor applies where possession is taken under the deed, and also as to covenants, conditions and limitation, but should be applied with caution in construing the description of the property conveyed.—Golden v. Pilchuck Tribe No. 42, Improved Order of Redmen, Wash., 129 Pac. 93.

40.——Reservation.—A "reservation" is something taken back from what has been granted, while that which is excepted is not granted at all.—Beardslee v. New Berlin Light & Power Co., N. Y., 100 N. E. 434.

41.——Undue Influence.—Where a confidential relation by reason of legal relation exists, and the one occupying the superior position obtains a conveyance from the other, the presumption that the conveyance was obtained by undue influence arises.—Keys v. McDowell, Ind., 100 N. E. 385.

42. **Divorce**—Corroboration.—The rule that a divorce will not be granted on the uncorroborated testimony of the plaintiff applies not only to the cause for divorce but to every necessary element in the proofs.—Williams v. Williams, N. J., 85 Atl. 611.

43. **Eminent Domain**—Public Use.—"Public use," as used in the law of eminent domain, means for the use of many or where the public is necessarily interested.—Jeter v. Vinton-Roanoke Water Co., Va., 76 S. E. 921.

44.——Public Use.—The property taken in condemnation proceedings must be restricted to that which will reasonably serve the public use.—In re New Haven Water Co., Conn., 85 Atl. 636.

45. **Equity**—Corporation.—If a corporation's answer, when verified by an officer, is evidence under the equity rule, it is not available to prove an affirmative defense.—Coca Cola Co. v. Gay-Ola Co., C. C. A., 200 Fed. 720.

46.——Ejectment.—The title and right to possession of a tunnel, under the surface of land which a party other than the owner of the surface claims to have acquired by adverse possession, should be determined by an action of ejectment, and not by a suit in equity.—Condict v. Erie R. Co., N. J., 85 Atl. 612.

47.——Laches.—"Laches" is a defense peculiar to courts of equity, founded on lapse of time and the staleness of a claim, where no statute of limitations governs the case.—Hogge v. Shield, Va., 76 S. E. 934.

48. **Estoppel**—Misleading.—A party is not estopped by his sworn pleading or testimony in another action, which was dismissed, as to the ownership of an irrigation ditch, in the absence of a showing that the other party had been led to change his conduct to his damage, and should be allowed to explain them.—Central Trust Co. v. Culver, Colo., 129 Pac. 253.

49. **Evidence**—Book Entries.—Entries made in a book of account by a decedent need only be made within a reasonable time of the transaction alleged to have been recorded; what is a reasonable time depending upon the nature of the business and the time and manner of making the entries.—Thompson v. Cole, Ala., 60 So. 556.

50.——Res Gestae.—In an action against a veterinary surgeon, testimony of bystander that he told owner in veterinary's presence that the veterinary was killing the horse held competent as part of the res gestae.—Staples v. Steed, Ala., 60 So. 499.

51.——Res Gestae.—A statement, which so far as the court can say may be an incident immediately and unconsciously associated with the act, should be received in evidence, subject to the jury's right to reject, if they believe it "voluntary individual wariness."—Harrison v. United States, C. C. A., 200 Fed. 662.

52. **Executors and Administrators.**—Cavest Emptor.—A purchaser at an administrator's sale may rely upon deceased's record title the same as any other purchaser, where the rights of minors or incompetent persons are not involved.—Golden v. Pilchuck Tribe No. 42, Improved Order of Redmen, Wash., 129 Pac. 93.

53.——Expenses.—Where beneficiaries attacked the appointment, conduct and good faith of substituted executors, they were entitled to incur legitimate expense, to sustain the validity of the will, their appointment, and acts, and to an allowance out of the estate funds for reasonable expenditures in that behalf.—Tuckerman v. Currier, Colo., 129 Pac. 210.

54.——Probate Court.—The probate court is a court of general jurisdiction in the matter of granting letters of administration, and has the right to determine its jurisdiction in any case where its authority to issue letters of administration is invoked.—Carr v. Illinois Cent. R. Co., Ala., 60 So. 277.

55. **Frauds, Statute of**—Original Promise.—A contract by which defendant agreed to sell his one third interest in a threshing outfit in consideration of the purchaser and the owners of the other interests doing defendant's threshing for two years and crediting the amount against the price of defendant's interest in the machine was an original promise as to such co-owners and not a promise to answer for the debt of the buyer.—Olson v. McQueen, N. D., 139 N. W. 522.

56.——Parol Lease.—A parol lease for a term exceeding a year, where lessee has taken possession with lessor's consent, is enforceable as a tenancy from month to month, not being wholly void.—Backus v. Feeks, Wash., 129 Pac. 86.

57.——Personal Defense.—In an action by the shipper of cotton for damages for loss of a sale caused by the carrier's negligent delay, the carrier cannot relieve itself from liability by showing that the contract of sale was within the statute of frauds and no written memorandum was made.—Parish & Co. v. Yazoo & M. V. R. Co., 60 So. 322.

58.——Work and Labor.—A contract by plaintiff to manufacture and deliver to defendant a soda fountain of particular dimensions according to a special design furnished by a third person, plaintiff assembling the various parts and delivering the completed fountain to defendant, was a contract for work and labor and not within the statute of frauds.—Bond v. Bourk, Colo., 129 Pac. 223.

59. **Fraudulent Conveyances**—Husband and wife.—In case of a grant by a husband to his wife, she has the burden of proving the bona fides of the transaction as against his creditors; all presumptions being in their favor.—Eason v. Lyons, Va., 76 S. E. 957.

60.——Remedy.—Where property alleged to have been fraudulently conveyed was in the possession of the vendee, who apparently held in good faith and for consideration, the sale should be attacked by direct action, and not by attachment.—Merchants' & Farmers' Bank v. Harris, La., 60 So. 362.

61. **Guardian and Ward**—Confidential Relation.—A guardian may not trade with himself on account of the ward or use or deal with the ward's property for his own use and benefit.—Charles v. Witt, Kan., 129 Pac. 140.

62. **Guaranty**—Construction.—where a guaranty was made at the same time a contract of sale was entered into, the instruments are to be construed as one for the purposes of interpretation.—Catskill Nat. Bank v. Dumary, N. Y., 100 N. E. 422.

63.——Independent Contract.—A guaranty contract may stand by itself, though the obligation guaranteed is invalid; the question whether the guarantor's liability is measured by that of the principal debtor being largely a matter of the construction of the guaranty contract.—Backus v. Feeks, Wash., 129 Pac. 86.

64. **Husband and Wife**—Alienation of Affections.—A wife suing for the alienation of the affections of her husband must, to recover compensatory damages, show an intentional alienation, but need not show that defendant's acts were malicious.—Miller v. Pearce, Vt., 85 Atl. 620.

65.——Libel and Slander.—A husband may recover for the loss of his wife's society and services caused by mental distress and physical illness caused by a publication of words libelous per se.—Garrison v. Sun Printing & Publishing Co., N. Y., 100 N. E. 430.

66.—Separate Agreement.—The rights of inheritance in the property of the wife are not to be denied the husband on account of a separation agreement, unless the purpose is expressed or clearly inferable.—Dennis v. Perkins, Kan., 129 Pac. 165.

67. **Injunction**—Building Restrictions. — A written agreement between adjoining lot owners that each should not build nearer than three feet to the common line in certain places, though not enforceable at law, will be enforced in equity against an alienee with notice.—Cotton v. Cresse, N. J., 85 Atl. 600.

68. **Insurance**—Amending Rates.—A foreign statute under which a mutual benefit corporation is organized, authorizing fraternal beneficiary organizations to change and amend their rate of assessment, does not apply to the assessment of a member whose contract with the corporation was entered into, made, and completed in New York.—Green v. Supreme Council of Royal Arcanum, N. Y., 100 N. E. 411.

69.——Indemnifying Bond.—A bond indemnifying an employer against loss by fault of an employe is not invalid because not signed by the employe as provided by the bond, where it is delivered to the insured and premium collected.—Fowler v. Title Guaranty & Surety Co., Kan., 129 Pac. 171.

70.——Notice of Loss.—"Immediate notice" of loss under an indemnity insurance policy means no more than that the degree of promptitude which is reasonable under the circumstances.—National Surety Co. v. Western Pac. Ry. Co., C. C. A., 200 Fed. 675.

71.——Proximate Cause.—In order that deceased's alleged violation of the criminal law in carrying a concealed weapon at the time he was killed should be within a policy provision limiting insurer's liabilty under such circumstances, it must appear that insured would not have been killed had he not been violating the law.—Baker v. Supreme Lodge, K. P., Miss., 60 So. 333.

72.——Suicide.—A stipulation in an accident policy that insurer shall not be liable for intentional suicide will be enforced.—Layton v. Inter-state Business Men's Accident Ass'n, Iowa, 139 N. W. 463.

73. **Judgment**—Collateral Attack.—A judgment of a probate court in Alabama, having jurisdiction of the subject-matter, granting letters of administration, cannot be collaterally attacked in Georgia for fraud.—Alabama Great Southern R. Co. v. Hill, Ga., 76 S. E. 1001.

74. **Landlord and Tenant**—Condition Subsequent.—Where a lease is avoided by a breach of a condition subsequent by the tenant, the landlord or his executor may re-enter, and, where the tenant refuses to deliver possession, the landlord or his executor may recover possession by ejectment.—Shannon v. Long, Ala., 60 So. 273.

75.——Covenant to Repair.—A landlord's covenant, at the beginning of the tenancy to "put" in repair, is distinct from a covenant to "keep" in repair, and is broken by a failure to repair within a reasonable time, so that no notice thereof is necessary; but to charge a landlord with a breach of his covenant to keep in repair notice must be given.—Marsicano v. Phillips, Ala., 60 So. 553.

76.——Holding Over.—A tenant suffered by the landlord to remain in possession after expiration of the original term holds over on the terms of the original lease, subject to the same rent and the same covenants.—Hobday v. Kane, Va., 76 S. E. 902.

77. **Larceny**—Asportation.—Neither the duration of the time of dominion over the property nor the distance of removal is material to the crime of larceny, where there has been an actual wrongful custody and control, and asportation by defendant.—Phelps v. State, Ala., 60 So. 537.

78. **Limitation of Actions**—Trust.—Where a husband who purchased land with his wife's money did not deny the existence of the resulting purchase-money trust, but impliedly admitted it, he cannot rely on limitations to prevent its enforcement.—Johnson v. Foust, Iowa, 139 N. W. 451.

79. **Master and Servant**—Fellow Servant Rule.—The Legislature has power to modify the fellow servant rule or to abolish it altogether.—Vota v. Ohio Copper Co., Utah, 129 Pac. 349.

80.——Wrongful Discharge.—In an action by a servant who was improperly discharged, her measure of damages is the difference between the amount she would have earned under the contract and the amount she actually earned by reasonable efforts at similar labor.—Kelley v. Royal Neighbors of America, Iowa, 139 N. W. 481.

81. **Mines and Minerals**—Joint Lease.—An oil and gas lease, executed by several owners of contiguous lands described as a single tract, contemplating a single well as a condition to its continuance and providing for payment of commutation money to the lessors jointly, is a joint lease of a single tract.—South Penn Oil Co. v. Snodgrass, W. Va., 76 S. E. 961.

82.——Location.—An entry upon a mining claim before a prior locator is in default cannot be made for the purpose of making a provisional location, to be valid in case the prior locator fails to do the annual work.—Rooney v. Barnette, C. C. A., 200 Fed. 700.

83.——Surface Rights.—The execution of a lease to mine coal land will not authorize the lessee to dump slate and refuse upon the surface of the land unless the right be expressly granted.—Brasfield v. Burnwell Coal Co., Ala., 60 So. 382.

84. **Monopolies**—Actions.—That a manufacturer sells its products through a system of contracts which tend to maintain a monopoly does not preclude it from maintaining a suit to enjoin unfair and fraudulent competition by another manufacturer of a similar product.—Coca Cola Co. v. Gay-Ola Co., C. C. A., 200 Fed. 720.

85. **Mortgages**—Assumption of Debt.—Mere purchase of an equity of redemption in mortgaged land does not make the purchaser liable personally for the mortgage debt.—Van Eman v. Mosing, Okla., 129 Pac. 2.

86.——Deed Absolute.—The fact that a deed absolute in form is really a mortgage may be established by circumstantial evidence, especially where the grantor is dead.—Holien v. Slee, Minn., 139 N. W. 493.

87.——Foreclosure.—Delay will not furnish a defense to the foreclosure of a mortgage until there is a presumption that the debt is satisfied, in the absence of adverse possession.—Shockley v. Christopher, Ala., 60 So. 317.

88.——Redemption.—While property cannot be redeemed by piecemeal, yet an assignee of a mortgagor intending to reserve 10 acres without definite description in conveying the property back to the mortgagor had such an interest in the land, legal or equitable, as would entitle him to redeem.—Cowley v. Shields, Ala., 60 So. 267.

89. **Municipal Corporations**—Detinue. — Detinue is not the exclusive remedy of one who sells property to a municipal corporation under a void contract; but, where the city keeps the property, the seller may recover upon the implied contract.—City of Mobile v. Mobile Electrical Supply Co., Ala., 60 So. 426.

90. **Officers**—Personal Liability.—A public officer who refuses to perform a duty, without

which a just claim against the public cannot be paid, is personally liable to the claimant, but only to the extent of the actual loss occasioned. —Hupe v. Sommer, Kan., 129 Pac. 136.

91. **Partition**—Limitation of Action.—Where legal rights in lands are barred by limitations, and no ground for equitable relief appears, partition will not be granted.—Futch v. Parslow, Fla., 60 So. 343.

92. **Partnership**—Agency.—A partnership is liable for a tort of one of its members only when it is committed by such member when acting within the scope and prosecution of the partnership business.—J. R. Kilgore & Son v. Shannon & Co., Ala., 60 So. 520.

93. **Payment**—Mistake of Fact.—One paying money under a mistake of material fact may recover it in assumpsit either for money had and received, money loaned, or money paid.—Russell v. Richard & Thalheimer, Ala., 60 So. 411.

94.——Voluntary.—A voluntary payment by a third person, without request or duty to make it, extinguished the claim, so that the creditor has no claim which he can afterwards assign. —Penwell v. Flickenger, Mont., 129 Pac. 323.

95. **Physicians and Surgeons**—Gratuitous Service.—A veterinary surgeon undertaking to treat an animal gratuitously, cannot absolutely escape liability for his negligence; he being required to exercise some care.—Latham v. Elrod, Ala., 60 So. 428.

96. **Principal and Agent**—Authority.—Since the authority given an agent includes all the necessary and usual means of properly executing it, a subagent whose appointment is made necessary by the nature of the transaction for which the agent was employed would also be an agent of the principal.—Schloss Bros. & Co. v. Gibson Dry Goods Co., Ala., 60 So. 436.

97.——Revocation.—Notice of the revocation of agency must be given to the parties whom it is desired to effect, who are the agent himself and those persons who, from knowledge of his authority or previous dealings with him, would be likely to continue to deal with him, relying on his authority.—Mosnat v. Berkheimer, Iowa, 139 N. W. 469.

98. **Reformation of Instruments**—Mistake.—Where, by a mistake as to the effect of the language used, a writing does not truly express the contract, equity will relieve.—Gross Const. Co. v. Hales, Okla., 129 Pac. 28.

99. **Rewards**—Officer.—Where a suspected felon is arrested without a warrant by a deputy sheriff of a county other than the one wherein the arrest is made he is not debarred from recovering a reward therefor because he is such officer.—Marsh v. Wells Fargo & Co. Express, Kan., 129 Pac. 168.

100. **Sales**—Executing Contract.—Where a buyer repudiates an executory contract of sale, the seller may treat the contract as terminated, and at once sue for the damages sustained.—Jebeles & Colias Confectionery Co. v. Stephenson, Ala., 60 So. 437.

101.——Pleading.—Damages from the breach of an agreement to furnish plaintiffs gasoline to operate their gin, consisting of the rent of the gin while work ceased or if it had no rental value, interest on its value for that time were special damages and must be specially pleaded.—Standard Oil Co. v. Weeks, Ala., 60 So. 508.

102.——Printed Stipulations.—Where there was a written contract for the sale of flour, on the back of which was printed certain stipulations, purporting to be uniform rules for the sale of flour adopted by a Millers' Association, the stipulations on the face of the contract governed as to the time of delivery and as to carrying charges.—Hopkinsville Milling Co. v. Gwin, Ala., 60 So. 270.

103.——Seller's Lien.—An unrecorded seller's lien on personal property is good as between the parties and as to all other persons, except purchasers for value without notice and creditors of the buyer.—Birch River Boom & Lumber Co. v. Glendon Boom & Lumber Co., W. Va., 76 S. E. 972.

104. **Set-Off and Counterclaim**—Recoupment. —One sued on a contract for labor may recoup the damages sustained for failure to complete the work within the time specified or for failure to comply with the contract in other respects.—Belleview Cemetery Co. v. Faulks, Ala., 60 So. 461.

105. **Specific Performance**—Right of Action. —Where partners in a mercantile business employed a third person to carry on the business for a time necessary to pay firm debts and to make advances for that purpose, and the partners thereafter contracted to exchange the stock of merchandise for plaintiff's real estate, plaintiff, in the absence of proof of the completion of the third person's contract of employment, could not compel specific performance of the contract of exchange.—Hill v. Lofgren-Harris Mercantile Co., Colo., 129 Pac. 208.

106. **Sunday**—Legislation. — The Legislature has power to enact statutes regulating the observance of the Sabbath and preventing its desecration; it being the sole judge of what constitutes disturbances of the Sabbath.—People v. Dunford, N. Y., 100 N. E. 433.

107. **Trusts**—Spendthrift Trust.—To create a spendthrift trust, it is not essential that the instrument denominate the beneficiary a spendthrift, or give reasons for creating the trust, or contain all restrictions incident thereto, or an express declaration that the interest of the beneficiary shall be beyond the reach of creditors.—Hoffman v. Beltzhoover, W. Va., 76 S. E. 968.

108. **Vendor and Purchaser**—Option.—The holder of an option to purchase real property, who has fully executed the contract by payment of the purchase price, although receiving no deed therefor, becomes vested with the equitable title to the land as against the vendor and his grantees with notice; such title relating back to the date of the option.—Crowley v. Byrne, Wash., 129 Pac. 113.

109. **Waters and Water Courses**—Injunction. —The chancery court has jurisdiction to enjoin the damming of a bayou or other natural water outlet, where the injury therefrom is manifest, and continuous or constantly recurring, and the right to relief is clear.—Board of Sup'rs of Quitman County v. Carrier Lumber & Mfg. Co., Miss., 60 So. 326.

110.——Obstruction.—One who wilfully places and suffers an obstruction to remain in a stream for the purpose of vexing or harassing an upper owner by setting back water is liable in punitive damages.—Black v. Hankins, Ala., 60 So. 441.

111.——Public Use.—Persons of the class for whose benefit water is appropriated or dedicated to public use are entitled to demand service, regardless of whether they have previously enjoyed it or not.—Jeter v. Vinton-Roanoke Water Co., Va., 76 S. E. 921.

112.——Pollution.—In a suit for damages to real property caused by the pollution of a stream through the introduction of sewerage, the owners are entitled to adequate compensation; and so, where the bed and banks of the stream have been permanently polluted, they are entitled to damages therefor, even though the emptying of the sewerage has been stopped. —Doremus v. City of Patterson, N. J., 85 Atl. 606.

113.——Prior Appropriation.—A senior appropriator, though entitled to a large flow of water to irrigate a small area lying so close to the stream that the water will return, cannot as against junior appropriators divert that same amount of water at another point to irrigate lands lying so far from the stream that it cannot return.—Larimer County Canal No. 2 Irrigating Co. v. Poudre Valley Reservoir

114. **Wills**—Intention.—The rule that heirs and heirship are favored operates in the construction of will only in doubtful cases, and it may not defeat the clear intention of testator, nor interfere with his right to dispose of his property as he chooses.—Shackleford v. Washburn, Ala., 60 So. 318.

115.——Vesting.—The law favors the vesting of estates in real property at the earliest possible moment; the rule being the same although the estates be created through the medium of a trust.—Commonwealth v. Welford, Va., 76 S. E. 917.

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A. H. Robbins, 420 Market St., St. Louis, Mo.
N. C. Robbins, St. Louis Mo.

Known bondholders, mortgagees, and other security holders, holding 1 per cent or more of total amount of bonds, mortgages, or other securities:

None whatever. A. H. ROBBINS, General Manager.

Sworn to and subscribed before me this 11th day of March, 1913. DANIEL SCHMITT, Notary Public.

My commission expires Sept. 14, 1916.

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